ENG BCA No. 6398
BEAN HORIZON-WEEKS MARINE (JV)

Disputes, Jurisdiction, Government Claim, Contracting Officer Appealable Decision--the Government's motion to dismiss for lack of jurisdiction was denied; the letter from the Contracting Officer to the contractor made factual findings and conclusions, referred to pertinent provisions of the contract, stated that the contractor had been overpaid, and required payment to the Government, thereby deciding a Government claim that was appealable to the Board.

Disputes, Procedure, Consolidation of Related Appeals--the contractor's motion to consolidate two appeals was granted because the Government's claim in the second appeal was related to part of its defense in the first appeal; therefore, the Board would be in the best position to decide both appeals in a comprehensive and consistent manner by combining the appeals.

U.S. ARMY CORPS OF ENGINEERS BOARD OF CONTRACT APPEALS

Appeal of	)	
	)	
BEAN HORIZON-WEEKS MARINE (JV)	)	ENG BCA No. 6398
	)	
Under Contract No. DACW51-94-C-0016	)	

Appearances for the Appellant:	Peter M. Kilcullen, Esq. Christopher M. Johnson, Esq. Kilcullen, Wilson & Kilcullen Washington, D.C.
Appearances for the Respondent:	Frank Carr, Esq. Chief Trial Attorney Washington, D.C. Donald M. Harris, Esq. Government Trial Attorney New York, New York

OPINION BY ADMINISTRATIVE JUDGE REED
ON
RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION
AND
APPELLANT'S MOTION TO CONSOLIDATE

Motion to Dismiss for Lack of Jurisdiction

The construction contract underlying this appeal is for beach replenishment by way of offshore dredging. In an earlier appeal under the contract, ENG BCA No. 6284, presently pending before the Board for decision, Bean Horizon-Weeks Marine (JV) (the Appellant or the JV) claimed extra costs, measured by the contract unit price, of alleged additional beach replenishment materials. Among other defenses in the earlier appeal, the Respondent, U.S. Army Engineer District, New York (the Corps), argued that the JV had improperly dredged some of the materials from outside the limits of the designated ocean borrow area.

Following the hearing on the earlier appeal, the Corps' Contracting Officer (CO) issued a letter to the JV dated April 27, 1998, that stated, inter alia, (1) that almost one-fourth of the materials dredged by the JV had been obtained from outside the limits of the borrow area, (2) that, according to a specified contract provision, such dredging had been improperly conducted,

and (3) that no payment could be made under the contract for the materials improperly dredged. The Corps characterized its earlier payment for materials allegedly dredged from outside the borrow area as an overpayment and requested that the JV remit $1,166,188, within 30 days of receipt of the CO's letter. That sum is the alleged improperly dredged quantity multiplied by the contract unit price for placement of beach replenishment materials.

The CO's letter also requested submittal by the JV of a plan to restore the borrow area "to ambient depth" and to "permitted depth." The letter further noted that the JV might be "subject to fines and penalties by the New York State Department of Environmental Conservation."

The JV asserts that the letter is a Government claim under the contract. Therefore, it has appealed to the Board by counsel's letter dated April 28, 1998. The Corps, in a "Motion to Dismiss for Lack of Jurisdiction" (motion to dismiss), dated June 4, 1998, asks the Board to dismiss the appeal for lack of jurisdiction, contending that no appealable CO decision (COD) has yet been issued.

The Corps' argument in the motion to dismiss, that the CO's letter is not an appealable affirmative Government claim, is based on Mobley Contractors, Inc., ENG BCA No. 5655, 90-3 BCA ¶ 23,031, and The Sharman Co. v. United States, 2 F.3d 1564 (Fed. Cir. 1993), overruled in part, Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995). In Mobley, the Board determined that a suspension decision by the Army's Suspension Official (ASO) was not a claim under a contract because the ASO was not acting in a capacity as a contract administrator and the ASO's decision letter addressed matters related to the continued suspension of Mobley and its two shareholders, not matters related to a claim under a contract. The suspension letter also lacked the mandatory nature of a demand and the unequivocal assertion of a claim of right. Instead, it responded to offers by Mobley to lift the suspension. No mention of a collection or set-off action to recover money from Mobley was made. We find the Mobley decision inapposite.

A claim, in the context of this appeal, is a written demand or a written assertion by the Government seeking as a matter of right, under the terms of the contract, the payment of money. The writing must set forth a clear, unequivocal statement of the contractual basis and amount of the claim. Placeway Constr. Corp. v. United States, 920 F.2d 903 (Fed. Cir. 1990); Contract Cleaning Maint., Inc. v. United States, 811 F.2d 586 (Fed. Cir. 1987); Volmar Constr., Inc. v. United States, 32 Fed.Cl. 746 (1995); FAR 52.233-1 (the standard Disputes provision, included in the contract).

The CO's letter in Sharman, supra, sought a refund of alleged unliquidated progress payments resulting from a termination for default. The letter also invited discussion and

negotiation of the amount of the refund. Therefore, the court determined that the CO's letter was a tentative determination rather than a so-called final decision.[1]

In this case, the letter from the CO to the JV stands in sharp contrast to the suspension action in Mobley and the CO's invitation to negotiate in Sharman. The CO describes a comparative analysis between pre-dredge and post-dredge survey information. The CO then states a factual conclusion that 555,328 cubic yards (CY) of material "was obtained from outside the authorized borrow limits." The CO next cites two particular contract provisions that, when read together, forbid obtaining material from outside the established limits of the borrow area and warn that "[n]o payment shall be made for material placed . . . [w]hich was obtained from outside the designated borrow area or below the maximum dredging limit of the borrow area. . . . Accordingly, [the JV has] been erroneously overpaid for 555,328 CY, or $1,166,188.00 . . ." In addition to the basis for the required payment, the CO's letter gives instructions regarding the due date for payment and the identity of the payee. Neither discussion nor negotiation is invited. The writing describes the claim, refers to pertinent contract provisions, and sets forth the factual and contractual basis for the claim. The CO decided and expressed in the letter both the JV's liability and the quantum of the Corps' claim. Those positions are stated with finality. An appeal to this Board is a proper next step for the JV to obtain an adjudication of its dispute with the CO's findings and conclusions. Indus. Data Link Corp., ASBCA No. 49348, 98-1 BCA ¶ 29,634; Rivera Technical Products, Inc., ASBCA No. 48171, 96-2 BCA ¶ 28,564; 41 U.S.C. § 605(a); FAR 32.211(a)(4).

Implicit in the Corps' arguments is the notion that the CO's letter is a routine request for remittance of an overpayment. For the reasons stated above, we disagree. In addition, we note the position taken by the Corps in the earlier appeal. In the pleadings for the earlier appeal, the Corps denied the JV's compliance with one of the same contract provisions cited in the CO's decision letter. (ENG BCA No. 6284, Complaint and Answer, ¶¶ 8). At the hearing of the earlier appeal, the Corps affirmatively defended against the contractor's claim based, in part, on the same contract provision. The demand letter underlying this latter appeal is not an initial, routine suggestion of overpayment. It converts the Corps' earlier affirmative defense into an affirmative

[1] The CO's action was also ineffective in that case because the claim was already "in litigation" when the CO issued a so-called final decision. The CO had been divested of authority to act on the claim by operation of 28 U.S.C. §§ 516-520, which gives the United States Department of Justice exclusive authority to act once a claim is put into litigation by the filing of a lawsuit based on the claim. Bath Iron Works Corp. v. United States, 20 F.3d 1567 (Fed. Cir. 1994).

Government claim.

One other matter deserves comment. Assertion of a contract claim by the Government is usually a two-step process. A demand letter gives the contractor notice of the potential claim and an opportunity to respond. If warranted, the CO's appealable claim decision follows. E.g., Instruments & Controls Serv. Co., ASBCA No. 38332, 89-3 BCA ¶ 22,237.

In this case, the due process notice requirement was generally satisfied when the Corps filed its answer in the earlier appeal. Notice was more specifically served by the end of the hearing in the earlier appeal. The requirements of an appealable CO's decision, as described above, are for the contractor's benefit. Therefore, the contractor may waive noncompliance with due process and FAR requirements, such as recitation of appeal rights, where the Government asserts a claim by way of a CO's decision. Placeway, supra; Volmar Constr., supra; Outdoor Venture Corp., ASBCA No. 49756, 96-2 BCA ¶ 28,490; Sprint Communications Co., GSBCA No. 13182, 96-1 BCA ¶ 28,068; May Ship Repair Contracting Corp., DOT BCA No. 2521, 93-2 BCA ¶ 25,561; J. Fiorito Leasing, Ltd., PSBCA No. 1102, 83-1 BCA ¶ 16,546; Vepco, Inc., ASBCA No. 26,993, 82-2 BCA ¶ 15,824.

The motion to dismiss is hereby DENIED.

Motion to Consolidate

Concurrent with filing this appeal, the JV, in a "Motion to Consolidate," requested that the Board consolidate this appeal with the earlier appeal. The JV argues, in pertinent part, "[t]he facts underlying the Corps' Claim are identical to the facts arising under the prior appeal and were addressed during [the] hearing" of the earlier appeal.

The Corps opposes consolidation. While the Corps recognizes that the Board has inherent discretion to consolidate, it urges against consolidation to avoid a delay in the decision of the earlier appeal. It characterizes the decision in the earlier appeal as "imminent" because the Board had informed the parties in May 1998, that much of the record had been digested by the presiding Administrative Judge and that preparation of a proposed decision would follow completion of the record review.

The parties completed their briefing of the earlier appeal on January 9, 1998. This appeal was filed April 28. The parties completed their briefing of the pending motions on June 18. Since then, the motions have been under active consideration; however, for the reasons stated below, the Board orders consolidation of the appeals.

The Corps disagrees that the facts in the two appeals are "identical," but admits that the appeals are "similar." The Corps is correct that the JV, in the earlier appeal, claimed for additional materials pumped onto the beach from the ocean borrow area. In that appeal, the dispute primarily concerns the alleged additional quantity of material needed to fill the beach to

the profile specified in the contract, the propriety of the Corps' design, and the JV's efforts properly and efficiently to place the materials on the beach. This later appeal concerns the alleged improper source of some of that material from outside the designated ocean borrow area.

There was considerable evidence introduced during the earlier hearing concerning the ocean borrow area and dredging activity in and around it. Confusion and controversy arose during the hearing concerning the identification and timing of documents reporting the results of the parties' post-dredging surveys of the ocean borrow area and whether the results of the Corps' survey efforts were properly shared with the JV during discovery proceedings. In the earlier appeal, the JV moved for sanctions related to the Corps' borrow area surveys and the data derived from those surveys. That motion is also pending. Some of the Corps' evidence that allegedly shows improper dredging outside the limits of the ocean borrow area would appear to be the subject of the motion for sanctions.

Rather than inefficiently plow the same ground twice, or worse, decide the earlier appeal and then be supplied evidence that conflicts with that decision, consolidation is proper. An expeditious supplemental hearing or record submission may be required to complete the record; however, when that process is completed, the parties will have had opportunity to present to the Board all pertinent facts and argument. At that point, the Board will be in the best position to decide both appeals in a comprehensive and consistent manner.

The motion to consolidate is hereby GRANTED. The parties will confer as soon as practicable to prepare for a conference with the Board.

Date: November 12, 1998

STEVEN L. REED
Administrative Judge

I concur.

I concur.

WESLEY C. JOCKISCH
Administrative Judge
Chairman

ROBERT T. PEACOCK
Administrative Judge
Vice Chairman

* * *

I certify that the foregoing is a true copy of the U.S. Army Corps of Engineers Board of Contract Appeals decision on the Respondent's Motion to Dismiss for Lack of Jurisdiction and the Appellant's Motion to Consolidate in Docket No. 6398, Appeal of Bean Horizon-Weeks Marine (JV), under Contract No. DACW51-94-C-0016.

Date: November 12, 1998

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MARYELLEN D. SIMPSON
Recorder